

Jeremy Bentham on open government and privacy

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“Tyranny would be banished from the earth, could it but once be sufficiently known”

(Bentham 1983b, p.386 [IX.20.A12])¹

1. Introduction

Jeremy Bentham wears many faces. He wears one face as the founder of Philosophic Radicalism and the intellectual inspiration behind the early career of John Stuart Mill (Mill 1838). In this guise, Bentham was one of the most important social and political figures of the late-eighteenth and early-nineteenth centuries. For some people, he was the advocate of a crude and unrealistic form of hedonistic utilitarianism, while yet others see him as the guiding force behind some of the most significant improvements in British public infrastructure, such as prison reform and city sanitation programmes. Yet, the ridicule that Bentham heaped on the doctrine of natural rights is one of the most famous aspects of his thought and for many readers of Michel Foucault’s *Discipline and Punish*, he is known as a defender of the contemporary surveillance state. Yet, he is also known among a smaller group of scholars as a radical democrat and a fervent defender of open government, even if his views on privacy and personal freedom are much less widely known.

Two of Bentham’s faces appear on his two heads. One head is a waxwork model which sits on top of his “auto-icon”. This commemoration of himself and his thought was the effigy that he ordered to be constructed from his preserved skin and skeleton. He

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ordered it to be posed in a seated position in his favourite clothes and with his favourite walking stick, which can be found now in the South Cloister of University College London (UCL). The other head is his real head, also preserved, which usually sits in a UCL vault following its theft several years ago by students of the King's College London, but which on special occasions sits between his feet behind the glass of the cabinet in which his auto-icon resides.

The auto-icon is not simply a strange joke by a strange man, although it is that too. Rather, the auto-icon is Bentham's attempt to debunk the socially-harmful prejudices that surrounded corpses in the early nineteenth-century, and in particular to debunk the then-Christian notion of the literal resurrection of the body on the Day of Judgement. The attempt was characteristic of the man because Bentham was an enlightenment figure. That is, he strove to replace obscurity, prejudice and myth with reason and evidence-based knowledge. Bentham argued throughout his literary career that only by doing so could one begin to counter the vested interests which the rich sought to promote through their exercise of their inordinate power. Even his infamous panopticon was part of this project. It was a prison at whose heart stood a central observation tower encircled by layers of cells, which enabled the guards to see every corner of the prisoner's accommodation without themselves being observed. As Bhikhu Parekh has noted: "It was not a metaphor for Bentham's society, which was really quite liberal in several respects. And it was a cheap and centralized way of constructing large prisons, whose internal regime was not particularly harsh." (Parekh et al 2011, p.57; see Semple 1993) In Bentham's terms, it was part of his grand attempt to achieve two key aims of a good state: "*Official aptitude maximized, expense minimized.*" (Bentham 1993, p.6)

This article sketches the key political dimensions of Bentham's utilitarianism, focusing particularly on the central importance that he placed on freedom of information as a necessary condition of the effective monitoring of public officials by civil society groups and individual citizens. Section two outlines the critical dimensions of Bentham's political theory, particularly the need to debunk metaphorical and obscure language so as to enable citizens to understand the real forces and interests at work in their world. Section three turns to his later constitutional theory, emphasising its radically-democratic elements. Section four focuses on Bentham's theory of open government, emphasizing its reliance on public scrutiny of the actions of office-holders, a function that he assigned to what he called the Public Opinion Tribunal. Section five analyses the place that he ascribed to personal privacy through a discussion of his liberal attitude to sexual practices. Section six reflects on the cogency and contemporary relevance of Bentham's theory.

2. Fallacies, utilitarianism and government

Jeremy Bentham lived from 1748 until 1832. Domestically, Britain saw rapid urbanization and industrialization, as well as an associated declining aristocracy. Despite these profound changes, the country remained custom-bound and profoundly hierarchical. Poverty, illiteracy, crime and disease were rife among the poor, while corruption and competing vested interests were rife among the rich, something that was reflected in regional and national government as well as in the professions, especially law, the church and medicine. To Bentham's eyes, these "sinister interests" used complex, slow, expensive specialist languages and procedures to exclude outsiders, and to justify their privileged position (Bentham 1996, chapter 1, section 13n.d).

The use of nonsensical concepts was not restricted to the legal, ecclesiastical or medical professions, however. They were central to all areas of social and political life, being embedded within the very language which provided the substance of these fields. Bentham dismissed such powerful concepts as were found in the French *Declaration of the Rights of Man and the Citizen* of 1791 and elsewhere, including the “social contract” and “natural rights”. Indeed, famously he dismissed “natural and imprescriptible rights” to “liberty, prosperity, security, and resistance to oppression” as “nonsense upon stilts” (Bentham 1973, pp.267, 269). They were “anarchical fallacies” in that they were fictions which, if applied literally, made government impossible. Each natural right was said to possess an absolute authority, meaning that when they clashed with each other neither had priority over the other. Moreover, their absolute authority placed unassailable limits on the legitimate actions of the state, irrespective of the current needs of society as a whole (Bentham 1973, pp.269-70). In this way, such “terrorist language” (as he called it) was profoundly dangerous. Bentham argued that rather than appealing to what were at best rhetorical flourishes, society and government should be founded on clear and specific concepts which, when organized and employed in a rational manner, tended to serve the real interests of the whole community (Bentham 1973, pp.269-70).

Bentham developed a theory of government that would operate on the correct normative principles. Just as importantly, however, the government should be motivated to address the problems. Bentham began from the axiom that although different people value different things, at root every individual was motivated to seek their own pleasure and to avoid their own pain. He saw this fact as being profoundly important in politics, as it ensured that the society which the government ruled was nothing more than a collection of

self-interested individuals. As he wrote in his 1789 book *An Introduction to the Principles of Morals and Legislation*,

“The interest of the community is one of the most general expressions that can occur in the phraseology of morals: no wonder that the meaning is often lost. When it has a meaning, it is this. The community is a fictitious *body* composed of the individual persons who are considered as constituting as it were its *members*. The interest of the community then is, what? – the sum of the interests of the several members who compose it.” (Bentham 1996, chapter 1, section 4)

On the basis of this hedonistic psychology (and not without making some rather obvious logical jumps), Bentham concluded that the highest value which the government should pursue was the maximization of net pleasure among society’s members viewed as an aggregate; or as he put it famously “*it is the greatest happiness of the greatest number that is the measure of right and wrong*” (Bentham 1948, section 2).

Even though Bentham insisted on this principle for the whole of his adult life, it contained crucial ambiguities (Tyler 2004). For example, while he gave many examples of types of pleasure and pain, he never published a clear explanation of what he meant by these terms at the generic level (Bentham 1996, chapter 5). The closest he came to doing so seems to have been when he wrote in his still-unpublished manuscripts that “I call pleasure every sensation that a man had rather feel at that instant than feel *none*. I call pain every sensation that a man had rather feel none than feel” (Jeremy Bentham’s unpublished

manuscripts, quoted in Dinwiddy 1989, p.22). There were even more fundamental problems for Bentham's "greatest happiness principle", not least the fact that it was incapable of producing determinate authoritative policy judgments or prescriptions because it established no priority between its two key variables: "the greatest happiness" and "the greatest number". Should the government seek to secure the greatest happiness of, say, 51% of the population even at the expense of the remaining 49%? Or should it seek to maximize the greatest possible aggregate pleasure of the whole population?

Bentham himself was unable to overcome these difficulties (Dinwiddy 1989, pp.25-28). Nevertheless, he appealed to the greatest happiness principle to justify a great many very specific policies. In international affairs, he sought the end of slavery and colonialism, and argued that war should be waged only in national self-defense and as a last resort, he argued for the recognition of the equality of all states and called for asylum to be granted to all oppressed foreigners. Moreover, he used the principle as the basis of his defense of open government, as will become clear shortly.

This section has set the scene for an analysis of Bentham's political thought. It began by outlining the social and political contexts in reaction to which Bentham developed his utilitarianism, especially the prevalence in society of sinister interests and the link that he saw between the power of the wealthy and the use of obscure and misleading modes of discourse. Finally, it highlighted some serious problems with his "greatest happiness principle". Against this background, the article will sketch Bentham's favoured constitutional arrangements, before analyzing the importance that he attached to open government and publicity.

3. Bentham's constitutional theory

The shortcomings of late-Georgian politics are so well-known that they almost do not need repeating. Only a tiny minority of the population could vote and almost all of that group were wealthy men, with many of the constituencies being rotten boroughs. Deep corruption was widespread throughout British society and in its imperial territories. Bentham spent much of his life condemning both British imperialism and British society more generally. As the thousands of pages of both published and unpublished writings attest, his attacks were not merely occasional or abstract rants. Rather, they were unrelenting attacks on both individual politicians, peers and other members of the gentry and business classes, but also detailed critiques of the practices of government and its civil servants, of lawyers, doctors and churchmen. His particular *bête noir* was not merely the wastefulness of the networks of sinister interests, but also the secrecy and unaccountability of this labyrinthine establishment.

For many years, Bentham hoped that the government could be persuaded to reform itself from within, primarily through its use of reason and good sense. However, the continuing failure of the government to adopt his plans for the panopticon in a thorough reform of the penal system led him to see the British government as an irredeemably corrupt institution, which existed solely to serve the sinister interests of its members against the good of society. Even after his loss of faith in the possibility of benevolent despotism which occurred in the early years of the nineteenth-century, Bentham did not restrict his contempt to the wealthy and well-placed. The oppressed and exploited were complicit in the system's survival. He was emphatic that, as he wrote in the 1816 "Advertisement" for his paper "Defence of Economy against the Right Honourable Edmund Burke", "submission

and obedience on the one part, are the materials of which power on the other part is composed” (Bentham 1993, p.45). It was only by the use of force, “if by anything,” Bentham wrote, “that such of them whose teeth are in our bowels, will be prevailed upon to quit their hold.” (Bentham 1993, p.45) The type of force that Bentham favoured most in Britain was generated by the interaction of hedonistic utilitarian constitutional principles, radical democratic structures, and open government (for example, Bentham 1990, sections 1-17). Hence, he was very happy to work with liberal governments that came to power across the world through the violent overthrow of a preceding oppressive government, such as happened in Greece, Tripoli and various Latin American revolutions of the 1810s and 1820s.

Bentham expounded his constitutional principles most clearly in his unfinished, posthumously-published book, *Constitutional Code, Volume 1* (hereafter, *Code*), a work which he intended “for the use of All Nations and All Governments professing Liberal Opinions” (Bentham 1983b, pp.136-37 [VII.2], and p.xin1). He argued that “the *all-comprehensive*, and only right and proper end of Government” was the “greatest happiness principle”: in other words, the ultimate aim which the government should seek was “the greatest happiness of the greatest number of the members of the community”. The myth has grown up that Bentham believed it was possible to measure utility precisely and to calculate which of the available options would lead to the best outcome. In fact, he did not make this highly implausible claim. He did dedicate the short fourth chapter of his early book *An Introduction to the Principles of Morals and Legislation* to considering “Value of a Lot of Pleasure or Pain, How to be Measured”, and in that he considered the factors affecting the “*value*” of any particular feeling of pleasure or pain (its “intensity”, “duration”, “certainty”, “propinquity” (or proximity), “fecundity”, “purity” and “extent”). Moreover, he

did not argue that this calculus relied on precise numerical measures of pleasure and pain. He was sceptical regarding the possibility of quantification, invoking ordinal measures instead.

In fact, Bentham was an indirect or rule utilitarian. He believed the “greatest happiness principle” was too vague to serve as a precise guide to political action. For this reason, he argued that the government should aim to serve a number of more concrete aims, he called “the *specific* and *direct* [sub-]ends of Government”. He organized these into “positive” and “negative” goals. By “Positive Ends”, he meant the “maximization of subsistence, [and] abundance, [as well as] security against evil in every shape” and the maximization of equality (equality added at Bentham 1983b, p.137 [VII.2]). In other words, the government should aim to create and sustain conditions under which its citizens can both meet their needs for physical survival and prosper. By “the all-comprehensive negative and *collateral* [sub-]end of Government”, Bentham meant “the avoidance or minimization of expense in every shape”. Obviously, this negative end was particularly significant given Bentham’s hatred of the abuse of government posts to feed the sinister interests of office-holders such as politicians, civil servants and indeed anyone whose private finances and reputation benefited directly from the state.

The other key elements of Bentham’s constitutional scheme concerned the structure of the democratic system. Specifically, he argued for the introduction of a codified constitution, the holding of annual elections for all Members of Parliament, the replacement of multi-member constituencies with single-member constituencies, the granting to constituents of the power to dismiss their representative at any time, and the introduction of a robust separation of powers with the highest parliamentary authority residing in the

legislature (Bentham 1838-43, pp.558-59; see also Bentham 1983b, p.48n1, 32 (V.3.1)). He argued for the abolishment of both tests of religious or other beliefs for the franchise and university degree courses, as well as the abolishment of the House of Lords so as to create a unicameral legislature. At his most radical, he even argued for the enfranchisement of women (Williford 1975; Sokol 2011). (However, he did not support female suffrage in *Code* (Bentham 1983b, p.29 (V.1.A3).) Moreover, he wished to see the legal and penal systems transformed. In opposition to the distorted laws of his own day, he insisted on the need for a single, simply-stated system of known laws for everyone and for the universal application of trial by jury. He insisted on the importance of clear, simple, cheap and impartially-applied legal procedures, for legal cases not to be protracted needlessly, and for convictions to be based on solid evidence. Finally, where guilt was established, he insisted on the application of punishments that were both proportionate and humane. Through these measures, Bentham hoped that the corruption-sodden politics of the early-nineteenth century could be replaced by a democratic politics in which reason and humanity would emerge from the wills of society's self-interested citizens.

4. Open government

It should be no surprise that Bentham was a staunch advocate of open government, given his hatred of vested interests and the mists of secrecy and obscurity with which they surrounded themselves. Within the first thirty pages of his massive *Code*, Bentham had turned to the vital importance of public opinion as a check on politicians and all other public functionaries. Hence, he placed what he called the "Public Opinion Tribunal" at the heart of the "Constitutive authority" of the state (see further Kelly 1990 and Cutler 1999). "The

sovereignty is in the people. It is reserved by and to them. It is exercised, by the exercise of the Constitutive authority” (Bentham 1983b, p.25 (III.A1)). It was the Constitutive authority which grounded the authority of the remainder of the state: that is, the legislature, executive, civil service and judiciary (Bentham 1983b, pp.26-27 (IV.A1-6)). The Constitutive authority was to be made up of “the whole body of the Electors belonging to this state”, a group which in *Code* included all men over the age of 21 who were able to read and who were not “Passengers” (by which he appears to mean those who were merely visiting the country). The Constitutive authority (and only it) had the ultimate authority to appoint and remove politicians and other public functionaries (including but not restricted to the Prime Minister, ministers and judges), and to order the trial of any public functionary whom it had removed from office for misconduct (Bentham 1983b, pp.30-32 (V.2.A2 and A5)).

As Bentham had already noted in an unfinished essay from 1822 entitled “Securities against Misrule”, the Public Opinion Tribunal was a fiction, but a useful one (Bentham 1990, p.28). Probably, Bentham had in mind that it was not a real tribunal. Indeed, it did not refer to an organized body of persons at all. It had no stable membership, no internal structure, no constitutive or substantive rules. In fact, as Bentham observed in *Code*, the Public Opinion Tribunal was made up of any one in the world, whether male or female, citizen or not, who took an interest in the actions of the various public functionaries who made up the formal branches of the state (Bentham, 1983b, p.35 (V.4.A2); Bentham 1983b, p.39 (V.6.A1-2)).

Members of the Public Opinion Tribunal exercised their various powers when they monitored, assessed and, where necessary, protested against these actions. Some of its members would listen to debates in the various national and lower legislatures, courts and

administrative forums; they or others of its members could organize and participate in public political meetings or plays with a political subject, as well as speaking or writing on political subjects (Bentham 1983b, pp.35-36 (V.4.A3)). Bentham argued that, in this sense, this amorphous group could be considered as being made of “so many Committees or Subcommittees”. Moreover, its multifaceted deliberations had a quasi-legal function along the lines of the common law, in that although its deliberations were not organized centrally, still it applied something very like laws to the actions of public functionaries (Bentham 1983b, p.35 (V.4.A2) Bentham 1983b, p.36 (V.4.A4)). Moreover, it gathered and assessed information that was relevant to this task, as well as censoring recalcitrant functionaries. In that it expressed itself through the individual votes of the electors, it determined who would hold public office (Bentham 1983b, pp.36-39 (V.5)).

Ultimately, the sole immediate weapon at the command of the Public Opinion Tribunal was publicity. As Bentham wrote in “Securities Against Misrule”: “It is by publicity that the Public Opinion Tribunal does whatsoever it does: any further than employment is given to his instrument, the workman can not do any thing.” (Bentham 1990, p.28) With this in mind, Bentham argued in *Code* that the constitution should both protect the negative conditions of public scrutiny and actively generate the positive conditions. Negatively, the government should neither ban nor tax public discussion of political matters (broadly conceived), for example as that occurred in newspapers and the like (Bentham 1983b, pp.40-41 (V.6.A3)). He did wish to retain the law of defamation “if [the remarks were] mendacious or temeracious”, but otherwise he argued that the state should allow complete freedom of expression except where issues of national security were at stake (Bentham 1983b, pp.39-40 (V.6.A2)). (Even when they were at stake, he insisted on the need for

careful and independent scrutiny to ensure that security laws were not being used as masks for oppressing the Public Opinion Tribunal.) Positively, Bentham's liberal constitution created a legal obligation on all functionaries to generate relevant information needed to facilitate the work of the Public Opinion Tribunal (Bentham 1983b, p.37 (V.5.A5)). This extended to the question of criminal prosecutions, which were to be held in public with full disclosure of evidence, except where matters of the most sensitive nature would be compromised by such disclosure (Bentham 1838-43b, pp.369-71). The judge was to decide which evidence was of this type, although the strong presumption should be that it was not, particularly given the frequent closeness of judges and the administration and the potential corruption to which that closeness might lead (Bentham 1838-43b, pp.370-71). Explicitly, Bentham rejected the granting of privacy to cases involving popular sedition, civil disobedience and the defamation of politicians (Bentham 1838-43b, p.372).

The constitution required these functionaries to carry out these tasks initially through inspection and investigation. Moreover, Bentham was explicit that such investigation was not to be restricted to public or quasi-public institutions, such as state-run schools or workhouses: "whatsoever the establishment, institution or foundation, – and howsoever *private*, – in no way can any interest which is not sinister be served, by screening it from public inspection, performed through the medium of the authorities hereby for that purpose constituted" (Bentham 1983b, p.385 (IX.20.A10)). The powerful were not restricted to the government. They included entrepreneurs, lawyers, church officials and medical professionals. Now, one might add media moguls, successful musicians and a great many other professions. Immediately, this raises questions regarding Bentham's attitude to the

proper limits of investigations into individual affairs and particularly regarding his attitude to the legitimate demands of personal privacy.

5. Personal privacy

Bentham was conscious of the fact that insisting on complete publicity ran the risk of exposing the individual to the “tyranny of the majority”, increasing the vulnerability of the already powerless (Mill quoting de Tocqueville, in Mill 1993, p.73). In the contemporary context of cybercrime and expansive systems of social media complete publicity increases the likelihood of identity theft, trolling and the like. Bentham wrote surprisingly little about the importance of personal privacy, and what he did write divides scholars. Some scholars effectively ignore the question, turning instead to Bentham’s defense of constitutional liberties, and particularly the fact that he justified liberties of thought and expression as checks on public institutions, as noted in the previous section (for example, Schofield 2006, pp.234-40). For scholars such as Douglas Long, this justification gave a very worrying slant to Bentham’s beliefs, not merely regarding the proper limits of free expression by individuals and groups, but regarding the types of ideas that could be expressed. As we saw in section three, Bentham required that public deliberations be conducted using language that referred only to real entities or to clearly-understood necessary fictions. Long concludes:

“[Bentham’s] purposes remained manipulative in spite of his endorsement of specific sorts of liberty. If he did not see himself as aiming to restrict conscious deliberation, that was because his real purpose was to redefine both consciousness and deliberation, and in so

doing to define the conscious person in largely “reactive” terms. Only within the boundaries established by his science of human nature would it be considered expedient to stimulate public discussion and debate.” (Long 1977, p.198)

The Public Opinion Tribunal was to carry out its work using what Bentham saw as the appropriate non-fictitious terminology and utilitarian values. He held that to the extent it did not do this, criticism would allow irrationality to creep back into their deliberations. To the extent that harmful deliberations influenced the public realm, legislation, government practice and ultimately the lives of individuals would be corrupted.

Many difficulties arise from Bentham’s requirement that public discussions and investigations be conducted making reference solely to real entities and necessary but clearly-understood fictions. Firstly, even his most concerted attempts to design deconstructive techniques whereby social critics could both (i) identify the set of real entities and useful fictions, and (ii) distinguish members of this set from fictitious entities and harmful fictions, suffered from fatal logical flaws. His failure to criteria by which to justify his choice of real entities meant that, ultimately, his deconstructive techniques relied upon his largely personal beliefs about the nature of reality (see Tyler 2004; also Tyler 2003). Secondly, Bentham held that only specialist censors would have the expertise and time to apply his deconstructive techniques (Bentham 1997, p.180). In this second case, he argued that other censors could use the set without having been involved in designing and justifying them. Yet, he recognized also that these practical censors were in constant danger of falling into error because of their relative distance from the work of the more philosophical censors. (The terms “practical censors” and “more philosophical censors” are

required to capture Bentham's meaning, even though he did not use the terms himself.) The implication was that the practical censors would be required to consult the more philosophical censors regarding the criteria to be used, a requirement that would give a great deal of practical power and responsibility to the more philosophical censors. This division of tasks might be ameliorated to some degree by Bentham's aspiration to teach the principles of censorial utilitarianism to the general population, in that some citizens might show some philosophical talent (Bentham 1970, pp.243-46; Bentham 1983a). Yet, he seems to have thought that, generally, competent philosophical censors would be in agreement regarding the sets of real entities and useful fictions, and would agree on the reforms required by changing circumstances. In other words, Bentham had a great faith in the unity of conclusions that accompanied the exercise of enlightened judgment.

It was partly because of his naïve faith that, in D.J. Manning's words, Bentham did "not seem to have considered it necessary to prepare a defence of individualism or of privacy." (Manning 1968, p.88) Yet, it is important to be careful here, because this does not mean that Bentham thought privacy to be unimportant. Firstly, as Fred Rosen noted, even though Bentham used the word "privacy" rarely, that was largely because he conceived of the issue as how the law would best maintain "security". By the latter word, Bentham seems to have meant, as Rosen put it, "the imposition on some not to interfere in the lives of others." (Rosen 1983, p.72) Such imperatives applied to laws as much as to private actions. Rosen placed great emphasis on the fact that Bentham saw law as opposite to liberty, even if in practice one needed some laws to maximize liberty overall. Rosen conceded that the legitimate "obligations [to maintain security] can be quite considerable. As the government acts, for example, to prevent invasion, crime, disease, and calamity." (Rosen 1983, p.72)

Hence, these actions might have required the individual to accept extensive state investigation, which would have been “destructive of [the individual’s] dignity.” (Rosen, 1983, p.72) Nevertheless, Rosen saw Bentham as defending privacy, because, although extensive such intervention would be neither “arbitrary” nor “tyrannical”. Rosen concluded that “A well-ordered [Benthamite] society, based on rational principles of security, need not be a totalitarian one.” (Rosen 1983, p.72)

Rosen’s conclusion is unjustified, because obviously while arbitrary rule was indeed oppressive, that did not mean that non-arbitrary rule was not authoritarian.² After all, one could strictly enforce a law requiring everyone to attend all government rallies and wave supportive banners while singing patriotic songs. The rule would be both non-arbitrary and authoritarian. There are more convincing reasons for seeing Bentham as respectful of personal dignity. In 1966, Negley praised Bentham for “distinguish[ing] carefully and distinctly the area of private, individual action and responsibility from that of political and legal liability.” (Negley 1966, pp.321-22) Yet, Bentham was concerned primarily to stave off “*oppression*” of ordinary citizens by public officials, that is, the causing of wrong “to a non-functionary *by a* functionary of any grade, by means of the power belonging to him as such” (Bentham 1983b, p.390 (IX.21.A2)). The “sole remedy” for oppression was publicity (Bentham 1990, pp.27-29). Even though, as noted above, publicity was effective primarily through the vigilance of the Public Opinion Tribunal, Bentham identified a number of other salient mechanisms. For example, he required that an official “*Incidental Complaint-Book*” be kept to record all official complaints lodged by citizens against public functionaries (Bentham 1983b, pp.395-96 (IX.21.A20.6)). Ministers were required to inspect their

² On the conceptual distinction between “totalitarianism” and “authoritarianism”, see Brooker 2000, pp.7-35.

departments annually and to pursue any complaints of misconduct that citizens had lodged against their functionaries (Bentham 1983b, p.277 (IX.9.A5)). Furthermore, restrictions should be placed on the information which the government was allowed to seek. Hence, citizens should be required to disclose a particular piece of information only if the cost of securing its disclosure was more than off-set by the benefit that the community could reasonably be expected to derive from its disclosure. Such costs were partly financial (the “expense” of employing the public functionaries, the cost to the citizens of recording the information, and so on) and partly non-financial (for example, the “vexation” caused to citizens) (Bentham 1983b, p.293 (IX.11.A12)). Moreover, Bentham argued strongly for certain constitutional requirements in relation to the collection of information from its citizens. For example, the latter were to be notified clearly and in advance of which types of information they might be required to give, and this notification must be recorded in the relevant nation’s constitutional code (Bentham 1983b, pp.292-93 (IX.11.A12)).

Bentham recognized that these protections alone were inadequate. The public disclosure of some types of information would almost always cause pain or “vexation” without generating a compensating benefit for the community. Hence, he argued that: “The demand which the case presents is a demand for prudential care of the individual himself or those under whose guardianship his condition in life has placed him, but not for any interference on the part of the legislator.” (Bentham 1931, p.477) This passage could have been taken directly from J.S. Mill’s *On Liberty*. The only significant difference between Bentham and Mill was that Bentham did not reserve this liberty solely to civilized societies in the manner that Mill reserved liberty (Mill 1993, pp.78-79).

Which types of sensitive information or beliefs fall within this realm of privacy?

Bentham was willing to endorse practices that most people would still regard as unthinkable. Indeed, he wrote but did not publish several works on these topics. For example, he advocated the legalization of infanticide, concluding that in circumstances such as illegitimacy or poverty, “A more normal [practice] can scarce be found.” (Bentham 1931, p.479; see also (Bentham 1931, p.486-88 Boralvei 1983, pp.130, 140) Many of his views have gained far wider acceptance than this. Hence, in *Code* he argued that public functionaries should not be allowed to enquire into citizens’ religious beliefs, as this would be to act as “if the profession of such opinion is regarded and treated as a crime” (Bentham 1983b, p.292 (IX.11.A11)). Yet, the sensitive topic to which returned more frequently than any other over the course of several decades was the legalization of prohibited sexual practices between consenting adults, not least male homosexual relationships (see Bentham 1931, 2013, 2014; Compton 1978a, 1978b; Campos Boralevi 1983, 1984; Sokol 2011). Bentham’s position changed very little over time. No sexual practice was “unnatural” or “impure”: what was repugnant to one person “to another is most delightful” (Bentham 1931, pp.495-96). He argued that the very many people who condemned homosexuality invoked a “false and spurious morality” which was surrounded by a “cloud of prejudices” (Bentham 1931, p.496). His view had definite utilitarian implications: “Applied to field of morality and to the field of religion, then it is that nonsense becomes a most productive source of cruelty and misery.” (Bentham 1931, p.483) Countering such prejudices would tend increase “the mass of pleasure” very significantly (Bentham 1931, pp.495-96). Hence, Bentham argued that punishment for sexual deviance between consenting adults was “pure evil”, as such sexual deviance brought only pleasure and so was “pure good” (Bentham 1931, p.491). The evil came from “legal punishment” (homosexuality was punishable by

hanging in Britain at this time), “infamy”, “fear of hell torment”, the giving of “false evidence” against the innocent, “self-banishment” by homosexuals, fear of legal punishment and infamy, “loss of enjoyment” and pain from “the sense of restraint... and violence of restraint” (Bentham 1931, p.491). Obviously, the possibility of “false accusation” created a powerful “instrument of extortion”, for something that even when committed was merely a “matter of taste” (Bentham 1931, p.492). Bentham considered and rejected all arguments that consensual sexual deviance was harmful (Bentham 1931, pp.494-95). Its legalization was an issue of “truth, public utility and justice”, in which Bentham advocated “[a]ll comprehensive liberty” (Bentham 1931, pp.493, 494).

It was this type of clash between conventional morality and practices that should the law should not prohibit on utilitarian grounds that led Bentham to advocate significant safeguards for personal privacy. He did not discuss this matter directly in relation to the investigative powers of non-judicial state functionaries. It seems that in part he did not discuss it in that regard because he held that the state had a *prima facie* right to demand almost any piece of information which it deemed likely to be pertinent to the well-being of the community. Nevertheless, in his *Rationale of Judicial Evidence* he did consider cases in which that *prima facie* right should be curtailed due to significant utilitarian concerns for the well-being of the individual. His primary concern in this part of that book was to determine what evidence should be heard in open court and on the public record, and which should be heard only by the judge and, depending on the sensitivity of the matter, the other parties involved in the case and necessary court officials. Bentham rejected systems of secret courts (“there should not anywhere be a single one” of these “seats of despotism” (Bentham 1838-43b, p.369)). Moreover, he rejected any system where some judges only heard cases in

secret: “the sense of responsibility, the habit of salutary self-restraint, formed under the discipline of the public school [that is, of open court hearings], will not be suddenly throw off in the closet.” (Bentham 1838-43b, p.369) He highlighted nine types of case in which the publicity of evidence and court proceedings might be restricted: where citizens might seek to disrupt court proceedings; where a witness seeks to make statements maliciously; where releasing certain information would expose the source of that information, thus rendering it liable to destruction (for example, where naming an informant endangers their life); where publicity would harm someone’s economic interests unjustifiably; where making specific information public would violate their legitimate privacy; where hearing certain facts would corrupt women and children; to preserve state secrets; where publishing evidence would be too expensive relative to the benefit generated; and where publishing the documents and transcripts would unduly increase the body of evidence (Bentham 1838-43b, pp.360-68).

We are concerned primarily with the fifth item on the list. Here, Bentham considered cases where “the peace and honour of families is concerned”, by which he might well have meant cases involving adultery, sexual deviance and sexual assault, all of which he mentions in this chapter of the *Rationale of Judicial Evidence* (Bentham 1838-43b, p.366). In those circumstances, “Publicity ... can have no better effect than that of pouring poison into whatever wounds have already been sustained.” (Bentham 1838-43b, p.366) Then, the judge should do whatever he deemed necessary to maintain the privacy of the relevant party, with Bentham’s preference being that the judge would hear sensitive evidence in a private room away from the other parties and members of the court. More than this, the judge should punish people who disclosed sensitive information with the purpose of harming the reputation of the other party: “there seems no reason why malicious vexation

in this shape should go unpunished, any more than in any other.” (Bentham 1838-43b, p.367) Bentham’s overriding goal was simply “[t]o preserve individuals from unnecessary vexation” (Bentham 1838-43b, p.364). Hence, the judge might choose to impose a fine, for example, where the malicious party “demand[s] his pound of flesh, his right of tormenting his adversary, by dragging into the daylight all those shades in his character, which (for the tranquility or reputation of one or both parties, their families, and other connexions) had better have remained in darkness.” (Bentham 1838-43b, p.367)

Despite his defense of privacy in these instances, Bentham insisted that judicial proceedings be kept public except where not doing so was likely to serve the greatest happiness of the greatest number (Bentham 1838-43b, p.369). Moreover, even when evidence was heard in private, records of the testimony must be kept. Such record-keeping helped to ensure that the judge did not exercise “a power completely arbitrary”, and to ensure that miscarriages of justice could be identified and rectified, and, conversely, that the innocent could be vindicated by subsequent scrutiny of the evidence on the basis of which the original judgment had been made (Bentham 1838-43b, pp.369-70). Finally, he held that privacy would be justified in a relatively small number of cases only (Bentham 1838-43b, pp.371-72). This section has shown that Bentham held very liberal views regarding some of the intimate aspects of an individual’s life and despite famous allegations to the contrary, he placed important restrictions on the handling of sensitive personal information.

5. Review and conclusion

This article began by noting Bentham's Foucauldian reputation as an early and fanatical advocate of the surveillance state. Yet, hopefully it is clear by now that in reality Bentham could not have been further from that stereotype. Bentham had a profound awareness of the innumerable harms caused by the abuses of power perpetrated not merely by the government, but possibly even more significantly by businesses and other networks of self-interested actors. Bentham railed against lawyers ("Judge & Co."), the prison establishment, members of the medical profession, the established church and a vast number of other sinister interests, of which the government was merely one. All of these groups worked to improve their own finances and status, usually at a huge and perpetual cost to the utilitarian good of the community. Bentham condemned their abuses with a venom and tenacity that exceeded even the most virulent social critic of the day. His attacks were always driven by a powerful combination of empirical detail and ethical commitment. Moreover, he demonstrated a practical awareness of the power of language and institutional control which far exceeded that of his contemporaries and almost all social critics writing today. It is particularly ironic therefore that he should now be seen as a strange, Georgian defender of institutional oppression.

For the last thirty years of his life, Bentham showed an overriding faith in the ability of the feelings of self-interest and the reason of each citizen to counter these abuses. As he wrote in *Code*, "Tyranny would be banished from the earth, could it but once be sufficiently known" (Bentham 1983b, p.386 (IX.20.A12)). Sectional interests would be rendered inert once citizens realized how their own self-interest was being subverted. Citizens could achieve this realization only to the extent that, by examining the subterfuges and abuses of the powerful, they functioned as a Public Opinion Tribunal. He placed intense trust in this

tribunal (Bentham 1983b, p.36 (IV.4.A4)). Hence, Bentham would have championed social media passionately had he been alive today.

Certainly, there are times when Bentham's faith in the utilitarian benefits of publicity was such that he did seem almost to believe that all should surveil and be surveilled, as Foucault alleged. Yet, as his writings on sexual freedom, religion and judicial evidence indicate, Bentham was a staunch defender of privacy in many areas of the individual's life. He could not have accepted Foucault's defeatist (and ultimately conservative) claim that as all discourses embody power, it is impossible for individuals to escape to a non-constraining environment. Instead, Bentham appealed to what he saw as the natural basis of all human good: pleasure and the absence of pain. Rather than endorsing Foucault's claim that all "natural" concepts were merely examples of biopower, Bentham argued that the truth could be exposed through linguistic deconstruction. Throughout, he insisted that while "[u]nder a government of Laws... the motto of the good citizen" was "*To obey punctually*", it was at least as important "*to censure freely*." (Bentham 1948, p.10) In short, he believed that rational investigation would lead all citizens to the same conclusions, including the same attitudes towards the appropriate areas of state intervention.

Yet, as with all other champions of radical democracy and social media, the most serious challenge that Bentham faces is whether his deconstructive methods could address the allegation which Herbert Marcuse leveled against Mill: that the elites running "liberal" societies can allow extensive freedom of expression and discussion because the dominant assumptions and beliefs of those societies are so oppressive that radical views will be taken seriously only by an inconsequential section of the population (Marcuse 1969a). In short, is Benthamic deconstruction sufficient to enable the Public Opinion Tribunal to escape what is,

in Marcuse's words, a "socially engineered arrest of consciousness"? (Marcuse 1969b, p.16) I have argued above and elsewhere that, sadly, it is not (Tyler 2003, 2004). Marcuse's method of regaining a free connection with one's instinctive nature was political re-education and the violent suppression of right-wing views, no matter how sincerely held (Marcuse 1969a, pp.122-37). If one does not wish to embrace that alternative, then one seems to left with something like Bentham's constitutional proposals.

Whether or not Bentham's belief in the power of reason seems too naïve in an age of corporate control of governments and media, ultimately he is not open to Foucault's criticism. Bentham's writings on open government and publicity were profoundly significant in his own day precisely as the most extreme proposals then-current for the creation of an independent, critical and very well-informed civil society, to act as a powerful check on public functionaries and private institutions. Ultimately, Bentham's was an especially radical position in an age of profound deference in which the vast majority of the population accepted social hierarchy, exclusion and corruption as cornerstones of many nations, not least the United Kingdom. He held that only with complete freedom of press, discussion and association could the Public Opinion Tribunal shed the light of publicity into the otherwise dark corners of the state and the sinister interests which dominate civil society, thereby violating the greatest happiness principle. For these reasons, it is almost impossible to imagine anyone who would have welcomed Wikileaks, Edward Snowden's revelations and the Panama Papers more fervently than the octogenarian Jeremy Bentham.

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